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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 110

SEYMOUR KOMITOR,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No.

SEYMOUR KOMITOR,

Petitioner,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Seymour Komitor, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered on April 8, 1968, which unanimously affirmed the order entered in the United States District Court for the Southern District of New York on October 4, 1967, denying petitioner's motion to withdraw a plea of guilty after sentence.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported. The decision of said Court denying petitioner's petition for rehearing (Appendix B) is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 8, 1968. A timely petition for rehearing was thereupon filed with said Court on April 18, 1968, and was denied on April 22, 1968.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Where an accused desires to stand trial but is persuaded by his attorney to change his plea to guilty and it appears that the attorney also represents the government's principal witness against the accused, was it not error for the court to accept the plea initially, and was it not "manifestly unjust" for the court subsequently to refuse to permit the accused to withdraw his plea and proceed to trial?

Statement

Petitioner, an attorney, was formerly employed by the Internal Revenue Service. In July 1966, five years after leaving the Service, he was charged with allegedly having accepted small sums of money from two accountants, Albert M. Goldstein and Sol Myers, in violation of Title 26 U.S.C. § 7214(a)(2). Petitioner pleaded not guilty. Thereafter he retained one Jacob P. Lefkowitz, Esq. as counsel.

On May 9, 1967, petitioner, accompanied by his then counsel, Mr. Lefkowitz, withdrew his plea of not guilty and pleaded guilty to Count Five of the indictment which charged him with accepting $15 from Mr. Myers on June 19,

1961, in connection with his examination of the 1960 joint income tax return of Louis and Dorothy Simon.

Before accepting petitioner's plea the Court asked him whether he would "mind telling me a little bit about what happened here? How did this come about?". Petitioner replied,

> "A. Well, your Honor, I was working in the Internal Revenue and there were many people that I dealt with, various accountants and taxpayers, and on the occasion of this charge one of the accountants with whom I had been handling—for whom I had been handling a tax matter gave me a gift of $15 because—he said it was because he wished to give me a gift.
>
> Q. You are talking about Sol Myers? A. Yes, your Honor.
>
> Q. And you knew, of course, at that time as an employee that you had no right to accept a gift from him? A. I did, your Honor."

On July 14, 1967, petitioner was sentenced to imprisonment for six months, probation for two years and a committed fine of $2500. The remaining eight counts were dismissed. On July 27, 1967, petitioner's motion for reduction of sentence was granted to the extent of making him "eligible for parole at such time as the Parole Board may determine."*

---

* The court below mistakenly considered "the six months' jail sentence being the focal point of this appeal" (p. A5 *infra*). Since petitioner's motion for reduction of sentence was granted, he would ordinarily be eligible for parole in about 60 days.

This appeal involves far more. Petitioner is fighting for his entire future. His professional life is at stake. That is why he seeks the opportunity to go to trial and establish his innocence.

The Conflict of Interest of Petitioner's Former Attorney

At the time of his plea and sentence petitioner was represented by Mr. Lefkowitz. Mr. Lefkowitz simultaneously represented Albert M. Goldstein, one of the accountants named in the indictment as the donor of the allegedly improper payments to petitioner. Mr. Goldstein was one of the government's principal witnesses against petitioner. Accordingly, if petitioner had proceeded to trial, as he originally wished, his counsel, Mr. Lefkowitz, would have been required to cross-examine his own client, Mr. Goldstein.

Mr. Lefkowitz recognized the clear conflict of interest in which he had placed himself and when petitioner said that he was innocent and wanted to go to trial, Mr. Lefkowitz told him that he also represented Goldstein and therefore could not act as petitioner's trial counsel. He stated that he would only represent petitioner on a plea of guilty (6-7).*

The district court was aware of the existence of this conflict of interest on the part of petitioner's attorney (9-10). Judge Cannella mistakenly believed, however, that the conflict was immaterial since (i) petitioner "was fully aware of it" and (ii) "I do not see any prejudice from it. I mean, suppose he was Goldstein's lawyer, where is the prejudice?" (28).

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* Numerical references in parentheses refer to pages of the minutes of the argument of appellant's motion to withdraw his plea before Hon. John Cannella, U.S.D.J., on October 4, 1967.

Petitioner's Motion to Withdraw His Plea of Guilty

Shortly after sentence, petitioner consulted new counsel and was advised for the first time that his admitted receipt of $15 from Mr. Myers, standing alone, was not *per se* an admission of a crime. Petitioner had been led to believe by Mr. Lefkowitz that the offense charged in the indictment was established upon a showing that he had received money from Mr. Goldstein and Mr. Myers irrespective of whether the gift was related to the performance of his duty. Petitioner informed his new counsel that he had not realized that the gift must have been for the performance of an official duty in order to constitute a crime; that he had not received the $15 from Mr. Myers for the performance of any such duty; and that when questioned by the Court at the time of his plea, he had not intended to state that he was guilty of receiving an illegal fee for the performance of an Internal Revenue duty.

On July 21, 1967, petitioner moved to withdraw his guilty plea. In support of his application it was urged that he had been induced to plead guilty by Mr. Lefkowitz who misled him as to the law and who was in such a conflict of interest situation as to leave petitioner in effect unrepresented by counsel. It was further urged that the conflict of interest tainted the entire proceedings relating to petitioner's plea and sentence.

Reasons for Granting the Writ

1. This Court is completely committed to the principle that an accused must have the effective assistance of counsel at every critical stage of the proceedings (*White* v. *Maryland*, 373 U.S. 59; *Gideon* v. *Wainwright*, 372 U.S. 335;

Hamilton v. *Alabama,* 368 U.S. 52). This includes the time of his plea to the indictment, for only the aid of counsel can enable "the accused to know all the defenses available to him and to plead intelligently" (*White* v. *Maryland, supra,* at p. 60).

Effective assistance, however, can only come from an attorney who is wholeheartedly committed to the cause of his client—not from one who simultaneously represents the government's principal witness. The attorney owes his entire and undivided loyalty to his client's cause. (See, ABA, Canons of Professional Ethics). As this Court so aptly stated in *Von Moltke* v. *Gillies,* 332 U.S. 708, 725-726:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision."

Neither was it contemplated that the accused should be represented by counsel for the government's principal witness. Such representation was nothing more than "hollow compliance with the mandate of the Constitution" (*Von Moltke* v. *Gillies, supra,* at p. 723).

The district court should not have permitted petitioner to enter a plea (or to have accepted his plea) until after petitioner had the opportunity to consult with, and receive the benefit of the undivided assistance of, new counsel. Under circumstances such as those presented in the case at bar, courts are not to speculate upon the degree of preju-

dice resulting from an attorney's divided allegiance. This Court made this point clear in *Glasser* v. *United States,* 315 U.S. 60, 75-76, where it stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Glasser v. *United States, supra,* is direct authority for vacating the judgment of conviction and granting petitioner's motion to withdraw his plea. There, as in the case at bar, the appellant himself was an attorney who had retained other counsel. On the day of trial, the court appointed appellant's counsel to also represent one of the co-defendants. Appellant was aware of the conflict of interest resulting from this appointment but continued to be represented by his counsel throughout the ensuing lengthy trial. The Court reversed the conviction and ordered a new trial, holding that appellant had been denied his right to have the effective assistance of counsel.

The Court below obviously disregarded the conflict of interest situation when it described petitioner as having been "represented by competent counsel" (p. A4, *infra*).

When a lawyer gives his client an opinion, and the client, relying on that opinion, enters a plea of guilty which has disastrous consequences on his future life, it is hard to understand how it can be maintained that "manifest injustice" has not occurred if the lawyer's opinion was tainted by his conflicting allegiance to the government's principal witness.

The federal courts, following this Court's lead, have uniformly reversed or vacated convictions where it appeared that the accused might have been deprived of effective representation because his attorney was in a conflict of interest (see *e.g., Porter* v. *United States,* 298 F. 2d 461; *Tucker* v. *United States,* 235 F. 2d 238; *Craig* v. *United States,* 217 F. 2d 355; *Wright* v *Johnston,* 77 F. Supp. 687). Heeding the pronouncement of this Court in *Glasser* v. *United States, supra,* the courts have held that:

> "The prejudice to a defendant from failure to have the effective assistance of counsel results whether counsel is court appointed or selected by the accused. The right 'is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' "
> (*Craig* v. *United States, supra,* at p. 359)

In *Porter* v. *United States, supra,* at p. 464, the court commented on the attorney's conflict of interest as follows:

> "Of course such things as this should never happen, and the place to stop it is the professional conscience of the advocate involved. A Court may not countenance it and must, on the contrary, take effective action just as we are certain the careful Judge below would have done had the facts been known at or before the commencement of the criminal trial. But where this has been allowed to occur, either through a calloused conscience of the attorney, or ignorance of the true facts by the Judge, the trial is not the fair one demanded by the Constitution."

Where it appears that the accused has, in effect, been deprived of his right to have the effective assistance of counsel, the court is without jurisdiction to proceed (*Wright* v. *Johnston, supra*). In the case at bar, the court should not

have accepted petitioner's plea. Having done so, it was "manifest injustice" not to permit petitioner to withdraw his plea after he consulted new counsel.

Petitioner merely seeks to exercise his "fundamental right to stand trial and to require the Government to establish the charges against him in accordance with substantive and procedural due process requirements of the Federal Constitution" (*United States* v. *Tateo*, 214 F. Supp. 560, 565). He should be given this opportunity.

2. The court below appears to have accepted the government's contention that there is something unfair or improper in petitioner's seeking to withdraw his plea of guilty after sentence. This Court should expressly declare that there is no merit to such an argument and should advise the lower courts that they should refrain from viewing defendants who seek such relief as somehow taking unfair advantage.

> "The entire administration of the criminal process runs on the principle that a defendant who pleads guilty expects more lenient treatment than if he exercised his right to a trial. Thus all guilty pleas may be considered as induced by an implicit promise of leniency. To this may be added the explicit inducements which often exist. Given these expectations which the *system* has created for its own purposes—i.e., to encourage pleas and thus avoid trials —it is not unreasonable for a defendant whose sentence has been 'unexpectedly severe' to attempt to undo it." (8 Moore, Federal Practice, p. 32-43)

3. This Court recently granted certiorari in *McCarthy* v. *United States*, F. 2d cert. granted, 36 U.S.L.W. 3411, to review the following questions: (1) Did the trial

judge's failure, before accepting guilty plea, to specifically ask the defendant if he understood the nature of the charges against him violate Fed. R. Crim. P. 11? (2) Did the District Court deny defendant his Fifth and Sixth Amendment rights by entering judgment of conviction without adequately determining that he understood the nature of the charges against him?

Similar questions are raised in the instant case. When petitioner was asked to tell the Court "a little bit about what happened here" he stated that he had received a gift of $15 from one of the accountants for whom he had been handling a tax matter. He was not asked and he did not say that this money was given to him in connection with his examination of income tax returns, as charged in the indictment. In petitioner's affidavit in support of his motion to withdraw his plea of guilty, he expressly denies that the $15 was given to him for the performance of a duty and alleges that he was misinformed and, at the time of his plea, did not understand the legal significance of his receipt of the money.

It is no answer to say, as the court below did, that petitioner had had an opportunity to talk to his counsel about the case and had related the facts to, and discussed the law with, counsel before entering his plea of guilty. Petitioner's consultation with Mr. Lefkowitz was meaningless because of the latter's conflict of interest. The Court should not have permitted petitioner to enter a plea, and should not have accepted his plea, until after petitioner had the opportunity to consult with and receive the benefit of the assistance of new counsel. At the very least, the court should have specifically inquired whether petitioner fully understood the nature of the charges against him.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 305—September Term, 1967.

(Argued January 25, 1968 Decided April 8, 1968.)

Docket No. 31869

UNITED STATES OF AMERICA,

Appellee,

—against—

SEYMOUR KOMITOR,

Appellant.

Before:

MEDINA, MOORE and ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannell, *Judge,* which denied appellant's motion to withdraw a plea of guilty after sentence.

Affirmed.

JEROME LEWIS, New York, N. Y., *for appellant.*

PIERRE N. LEVAL, Assistant United States Attorney, New York, N. Y. (Robert M. Mor-

genthau, United States Attorney for the Southern District of New York, New York, N. Y., and Paul K. Rooney, Assistant United States Attorney, New York, N. Y., of counsel), *for appellee.*

PER CURIAM:

In an indictment filed on July 1, 1966, appellant was charged with nine counts of having received fees, compensations and rewards for the performance of his duties as an Internal Revenue officer in violation of 26 U. S. C. §7214(a)(2). On July 28, 1966, appellant, represented by counsel, pleaded not guilty to all counts of the indictment. Later appellant obtained the services of another attorney and on May 9, 1967, withdrew his plea of not guilty and substituted a plea of guilty to Count Five which charged appellant with accepting $15 on June 19, 1961, from an accountant in connection with the examination of a 1960 income tax return.

Before accepting the guilty plea, Judge Cannella questioned appellant about the facts and implications of his plea. In response to these questions, appellant indicated that he had consulted with his lawyer, that he understood the law, that he had not been promised anything or threatened in any way, and that he changed his plea because he felt himself to be guilty of the charge.

On July 14, 1967, appellant was sentenced by Judge Palmieri to imprisonment for six months, probation for two years, and fined $2,500. The remaining eight counts were dismissed, without objection by the government, on motion by the appellant.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

On July 21, 1967, appellant, now represented by yet another lawyer, moved before Judge Cannella to withdraw his guilty plea. This motion was denied and we affirm.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> "*Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

This court has held that permission to withdraw a plea of guilty is a matter for the sound discretion of the trial court and "is reversible only if clearly erroneous." *United States* v. *Giuliano*, 348 F. 2d 217, 221 (2d Cir. 1965); *United States* v. *Hughes*, 325 F. 2d 789, 792 (2d Cir.), *cert. denied*, 377 U. S. 907 (1964).

The government contends that appellant simply gambled on getting a suspended sentence by pleading guilty and, when he did not receive what he had expected, he preferred to take his chances with a trial. Appellant, in turn, argues, as he must, that the court should permit withdrawal of the plea "to correct manifest injustice."

Appellant claims that he had poor advice from his lawyer who represented him at the time he entered the plea of guilty; that, as he then understood the law, he assumed he was guilty merely if he received the money and did not realize that the money must be received in connection with his employment before it is a crime; that at the hearing

in which he entered the guilty plea, he admitted receiving the $15 as a "gift"; and that nowhere did he state that he received the money in connection with the performance of his duties as an Internal Revenue officer. He now maintains that the money was received "in a purely social and friendship context one day when it happened to be my birthday . . . " (Affidavit in support of the motion to withdraw the guilty plea).

However, the indictment is clear. It charges that appellant "unlawfully, wilfully and knowingly did receive a fee, compensation and reward not prescribed by law, in the amounts hereinafter set forth for the performance of a duty, to wit, the examination of income tax returns hereinafter set forth." It strains credulity to think that appellant, himself a lawyer and represented by competent counsel, could have mistakenly pleaded guilty to this charge. The plea was not made in haste. Approximately nine and one-half months elapsed between the original plea of not guilty and the hearing on the motion to change the plea to guilty. Furthermore, the minutes taken at the time of appellant's guilty plea rebut his present contentions. The court ascertained that appellant had had an opportunity to talk to his counsel about the case and had explained to him "all the facts as you understand them"; that they had discussed the law and the punishment; and that appellant was "fully armed now with all the information you need to proceed at this time." The court, delving into the facts further, gave appellant an opportunity to state his own version, thus developing the "gift" of the $15 which appellant admitted he had no right to accept and that he was doing "something wrong." Even as to the extent of the punish-

ment (the six months' jail sentence being the focal point of this appeal), there was a full understanding as to the jail consequences of the plea. At first appellant thought it might be "Ten years—two years." Then appellant remembered that it was "two years." Finally, it was discovered that both terms were wrong and that the scope of punishment was "five years and $10,000 fine." Appellant acknowledged this possibility and in answer to the court's question, "Does that change your mind in any way as to the plea that you offered?" said, "No, your Honor."

We are satisfied that there was no manifest injustice here; that the requirements of amended Rule 11 of the Rules of Criminal Procedure as disclosed in the Notes of the Advisory Committee on Rules were satisfied; and that there was clearly no abuse of discretion on the part of the court below in refusing to permit appellant to withdraw his guilty plea.

Judgment affirmed.

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SEYMOUR KOMITOR,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the motion to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States is hereby granted subject to the provisions of Rule 28(c).

HAROLD R. MEDINA

LEONARD P. MOORE

ROBERT P. ANDERSON

Circuit Judges

April 22, 1968

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In the Supreme Court of the United States

OCTOBER TERM, 1963

SEYMOUR KOMITOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1447

SEYMOUR KOMITOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1968. A petition for rehearing was denied on April 22, 1968. The petition for a writ of certio-

rari was filed on May 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 32(d), F. R. Crim. P. provides:

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion, made after sentencing, to withdraw his plea of guilty.

2. Whether the attorney who represented petitioner at the time he entered his plea had furnished him ineffective assistance.

STATEMENT

A nine-count indictment returned in the United States District Court for the Southern District of New York charged that petitioner, while an officer of the Internal Revenue Service, had violated 26 U.S.C. 7214(a)(2) by unlawfully receiving compensation "for the performance of a duty, to wit, the examination of income tax returns hereinafter set forth." The indictment then listed the approximate dates upon which monies had been received, the individuals who made the payments, the taxpayers for whom the pay-

ments had been made, and the amounts. Count 5 charged that between June 20 and July 5, 1961, petitioner was given $15 by Sol Myers, in connection with the 1960 tax return of Louis and Dorothy Simon. The remaining counts charged four other payments by Myers, of $20 or $25, and four from Albert M. Goldstein, each of $50, for various taxpayers. In response to a bill of particulars, the government declared that the payments had been made during business hours at the Internal Revenue Service office in New York City.

Initially, petitioner entered a plea of not guilty to all nine counts. On May 9, 1967, he withdrew his plea as to count 5 and entered a plea of guilty. Following an inquiry into the voluntariness and knowing nature of the guilty plea (R-93-99, 108-114),[1] it was accepted. On July 14, 1967, petitioner was sentenced to imprisonment for six months, probation for two years, and a committed fine of $2500.

Four days later, petitioner filed with the sentencing court a motion for reconsideration and reduction of his sentence. In a memorandum supporting the motion, petitioner's retained counsel urged the court to give greater consideration to the fact that petitioner was an attorney, and had cooperated with the federal authorities (R. 63, 64):

> Prior to his deciding to plead guilty he had represented himself through his partner, Maurice W. Spiegel. It was subsequent thereto that he retained his present attorney, Jacob P. Lefkowitz, that he, after due and comprehensive discussions

[1] "R." refers to the record in the court of appeals, which has been filed with the Clerk of this Court.

> with his present counsel and Mr. Andrew Maloney, Assistant United States Attorney of the Southern District of New York, decided to fully cooperate with the United States Authorities completely and thoroughly.
>
> * * * *
>
> No one will derive any benefit from the incarceration of Petitioner. No one will be endangered by continuing Petitioner at liberty among society. In fact, Petitioner has not gone unpunished and is not of such low mentality that he has not been aware of his transgression.

At the end of the pleading petitioner placed his signature under an acknowledgment that he "has read the same and that the statements therein are true" (R. 65). In a memorandum filed on July 20, counsel professed that "up to the present time, Petitioner has had an opportunity to fully digest and understand the nature of the transgression which he committed" (R. 69). On July 27, 1967, petitioner's motion was granted to the extent that he was made eligible for parole "at such time as the Parole Board may determine." The court further commented, "This will be done because of the defendant's status as a lawyer and the serious sanctions which will probably confront him in his professional capacity" (R. 71).

On the same day that petitioner had filed his second memorandum in support of a reduction in sentence, he retained his present counsel. The next day, July 21, petitioner filed a motion under Rule 32(d), F. R. Crim. P., to withdraw his guilty plea. He alleged that he was unaware that the statute was violated only if the money he received was for the perform-

ance of an official duty. Petitioner claimed that the $15 received from Myers was not for the performance of a duty, but rather "in a purely social friendship context one day when it happened to be my birthday and Mr. Myers and I were talking over a legal problem in connection with an alien tax treaty, a field of law in which I happen to have special knowledge, and on which I had given Mr. Myers some advice, not in connection with any tax case that I was auditing as an Internal Revenue officer" (R. 76). Petitioner also averred that the gift from Myers was made after business hours on the street; that he did not understand the statutory requirements until after conferring with present counsel, Mr. Lewis; and that he was innocent of the eight withdrawn counts, in that he never received any of the money mentioned therein (R. 76-77).

At a hearing on the motion, Mr. Lewis charged that petitioner's prior counsel, Mr. Lefkowitz, had misinterpreted the applicable law by telling petitioner that he was guilty if he had accepted a gift from anyone doing business with the Internal Revenue Service, even though it had nothing to do with the charge in the indictment. Mr. Lewis asserted that petitioner relied upon this advice in pleading guilty, and that nothing occurred in the hearing at which his plea was accepted to indicate that the advice relied upon was incorrect (H. 9-10).[2] Mr. Lewis also advised that court that Mr. Lefkowitz had represented Albert M.

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[2] "H." refers to the transcript of the hearing on the motion to withdraw petitioner's guilty plea, which has been filed with the Clerk of this Court.

Goldstein, who had been named in the indictment as the donor of the monies involved in withdrawn counts 6-9; that when petitioner discussed his case with Mr. Lefkowitz, the latter advised him of his representation of Goldstein and that he could not try his case, but would take it as far as the plea. Mr. Lefkowitz then assured petitioner that he would receive a suspended sentence, with no threat of publicity or disciplinary hearings (H. 6-7). Mr. Lewis further charged that Mr. Lefkowitz had urged petitioner to drop a $250,000 slander suit against Goldstein (H. 11).

Government counsel pointed out that, in view of the record, it was incredible that petitioner, a lawyer, had not acted knowingly when he pleaded guilty. With regard to the claim of conflict of interest, counsel noted the lack of any prior allegation or supporting affidavit by Mr. Lefkowitz (H. 18-24). Following this argument, the court determined that there was no merit to any claim of conflict of interest because petitioner was fully aware of Mr. Lefkowitz's representation of Goldstein, and because petitioner was not prejudiced thereby, especially in view of the fact that Goldstein was not involved in count 5 (H. 28-29). As to the voluntariness and knowing nature of the guilty plea, the court indicated its disbelief in petitioner's claim. It stated that, following the discussion with petitioner at the time the plea was entered, "I was satisfied at the time that he knew what he was doing and nothing that has been said since satisfies me that it was any different; and under the circumstances, I deny the motion" (H. 33-39). The court of appeals affirmed in a *per curiam* opinion (Pet. App. 1-5).

ARGUMENT

1. As correctly stated by the court of appeals (Pet. App. 3), permission to withdraw a guilty plea after sentencing is a matter for the sound discretion of the trial court, and denial of that permission is reversible only if clearly erroneous. *United States* v. *Giuliano*, 348 F. 2d 217 (C.A. 2), certiorari denied, 382 U.S. 939; *Smith* v. *United States*, 324 F. 2d 436 (C.A. D.C.), certiorari denied, 376 U.S. 957. Nothing in the record warrants a finding that the court which accepted the guilty plea abused its discretion in refusing to allow its withdrawal. Petitioner, an experienced attorney, pointed out in his own affidavit that he "is not of such low mentality that he has not been aware of his transgression." He does not claim to have misunderstood the meaning of any words in the indictment.[3] That indictment charged, in pertinent part, that he violated the statute by receiving money from Myers "for the performance of a duty, to wit, the examination of income tax returns * * *." It is inconceivable that he failed to understand and that two other attorneys who worked on his behalf before sentencing failed to convey to him the simple import of the offense with which he was charged.

Moreover, the record discloses a number of instances prior to sentencing where petitioner's awareness of the nature of his offense was manifested. At

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[3] Petitioner had a copy of the indictment nine months before his guilty plea was entered (R. 91), leading the court below to conclude that "[t]he plea was not made in haste" but with a full understanding of all the pertinent information (Pet. App. 4).

a hearing on petitioner's motion for discovery, government counsel mistakenly stated that petitioner was charged with bribery. Both the court and defense counsel corrected him, declaring that petitioner was charged not with bribery but with unlawful acceptance of fees for the performance of duties. At the subsequent hearing during which petitioner entered his guilty plea, the following colloquy ensued between the court and petitioner (R. 95-96):

Q. Mr. Komitor, would you mind telling me a little about what happened here? How did this come about?

A. Well, your Honor, I was working in the Internal Revenue and there are many people that I dealt with, various accountants and taxpayers, and on the occasion of this charge one of the accountants with whom I had been handling—for whom I had been handling a tax matter gave me a gift of $15.00 because—he said it was because he wished to give me a gift.

Q. You are talking about Sol Myers?

A. Yes, your Honor.

Q. And you knew, of course, at that time as an employee that you had no right to accept a gift from him?

A. I did, your Honor.

Q. You knew you were doing something wrong?

A. Yes, sir.

At petitioner's sentencing hearing, Mr. Lefkowitz stated (R. 120):

> Here is a man who pleaded guilty and was convicted of the crime of accepting a gratuity for doing something which he was getting a salary

for and his job was to perform that duty, and it is against the law to accept such a gratuity.

Two days after sentencing, petitioner averred through counsel that he had had "an opportunity to fully digest and understand the nature of the transgression which he committed" (R. 69). Under these circumstances, and in view of the specific language in count 5 of the indictment, a post-sentencing claim that petitioner was not aware that the money he accepted from Sol Myers had of necessity to be related to the performance of duties as an Internal Revenue Service employee for the charge to stand strains credibility.

2. Petitioner's reliance on the fact that certiorari was granted by this Court in *McCarthy* v. *United States*, No. 1209, this Term, on April 29, 1968, is misplaced.[4] That case involved a refusal to vacate the defendant's sentence under Rule 11 even though defendant had made a statement to the trial judge which, he now claims, required further inquiry into the element of specific intent, thereby affecting the knowing nature of the plea. Whether or not the contention in that case is tenable, it has no bearing upon a situation such as the one in the instant case. Here the claim arises solely under Rule 32, and petitioner simply has failed to carry his burden of establishing "manifest injustice" and has shown no abuse of discretion in the trial court's denial of his post-sentencing motion to withdraw his guilty plea. Here the

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[4] The decision of the court of appeals in *McCarthy* is reported *sub nom. United States* v. *McCarthy*, 387 F.2d 838 (C.A. 7).

trial court thoroughly explored petitioner's understanding of the charge against him before accepting his plea (see Pet. App. 4-5). Accordingly, the pendency of the *McCarthy* case provides no reason for granting certiorari in the instant case.

3. At the hearing on petitioner's motion to withdraw his guilty plea, Mr. Lewis, for the first time, raised a claim of ineffective assistance of prior counsel, Mr. Lefkowitz. The belated claim was founded upon allegations that Mr. Lefkowitz did not furnish his undivided loyalty to petitioner since he also represented Albert Goldstein, who had been named in four counts as the donor of money to petitioner. From the time he first retained Mr. Lefkowitz, however, petitioner was aware of the relationship between the attorney and Goldstein. The attorney's relationship with Goldstein in no way conflicted with petitioner's interests, in view of the fact that all of the counts naming Goldstein were dismissed and Goldstein's name was not shown to be instrumental in petitioner's decision to plead guilty to one of the nine counts against him. The record further discloses a strong case against petitioner unrelated to any matters involving Goldstein. Petitioner can thus point to nothing in the record relating to Mr. Lefkowitz's relationship with Goldstein which could properly be viewed as constituting "manifest injustice" necessitating reversal of the decisions of the courts below. See *Hayman* v. *United States*, 205 F. 2d 891 (C.A. 9), certiorari denied, 346 U.S. 860.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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